IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 145.

GUSTAVUS LEACH ET AL.

vs.

CHARLES R. BURR ET AL.

PETITION FOR REHEARING.

Now come the plaintiffs in error in the above-entitled cause and respectfully petition this honorable court to allow them a rehearing in said cause upon the following grounds, viz:

First. For that whereas it appears in and by the record that the sole and only issues framed in this cause and submitted to the jury (Rec. pp. 8 and 9) were: (1) Whether the decedent was "of sound mind and capable." (2) Was the paper offered for probate "procured by threats, menaces, and duress." (3) Was the same "procured by the fraud of."

That these issues and none other were brought to trial by and before the jury on the 5th and 6th of March, 1900 (Rec. p. 11), on which latter day, under the direction of the trial judge, the jury returned verdict in favor of the proponents of the alleged will.

That no issue was framed or presented to the jury whether the paper writing propounded as a will was executed by the

decedent, Ezra W. Leach, and yet, that ten days thereafter, on the 17th of March (vid. Rec. p. 13), the judge aforesaid, without more, and especially without taking that "formal proof of its proper execution," indispensably required by section 4 of the act of June 8, 1898, then in force, or the evidence of any subscribing witness whatever, assumed to decree and did order the paper "admitted to probate and record as duly executed to pass real estate," in doing which, it is respectfully submitted, the court then and there transcended its jurisdiction and its act was and is void, which point of jurisdiction is always and in any case open to the judgment of this final tribunal but has not been touched upon in its decision.

Second. For that, by unquestioned evidence (vid. Rec. p. 21, lines 1 to 8 incl., of last paragraph; and lines 9 to 15, top of p. 23) it is established that by and through the alleged will it was the intention and purpose of the decedent to evade the letter, spirit, the long-honored and established policy of our law declaring that no devise or bequest—

> "to any minister," etc., "or to any religious sect, order, or denomination, or to or for the support, use, or benefit of, *or in trust for* any minister, public teacher, or preacher of the gospel as such, or any religious sect, order, or denomination, shall be valid unless the same shall be made at least one calendar month before the death of the testator."

Third. It is respectfully submitted that in considering the question of the competency of said Leach at the time of signing the paper propounded for probate to recall the natural ties of affection and obligation to provide for his kindred, this honorable court may have been influenced by the erroneous conception that the record failed "to show that he visited them or they him, or that they ever corresponded," while in fact it shows that he visited in Boston in 1895, staying two weeks with Mr. Cushing, his maternal relative

(v. top of p. 18, Rec.), that he then visited at least the caveator, Wm. F. Leach (v. Rec. p. 17), residing at Weymouth, Mass., 12 miles out from Boston. These facts are further supported by the testimony of Rawson (Rec. p. 15) and Fairbanks (Rec. p. 16), both disinterested witnesses.

And in support of such motion said plaintiffs in error respectfully submit the accompanying brief of authorities, etc.

The undersigned counsel for the plaintiffs in error in the cause hereinbefore entitled hereby certify that in their opinion the grounds set forth in the foregoing petition for rehearing are valid and sufficient to justify and require such rehearing.

WM. A. MELOY,
Counsel for Plaintiffs in Error.

I concur with the foregoing certificate.

GEO. F. HOAR.

BRIEF

to accompany the foregoing petition for rehearing in Leach et al. *vs.* Burr et al. No. 145 of October term, 1902.

I.

The silence of the opinion of the court touching the failure of the proponents to make the formal proof of execution in conformity with the statute strongly indicates that this point was not sufficiently pressed home to the mind of the court as to secure the attention it merits. And yet by the terms of the act of June 8, 1898, sec. 4 (vid. D. C. code, sec. 135), it is one of clear jurisdictional limitation, a proviso to the Congressional grant to the probate court of a new power never before given.

It was so held and insisted upon by the Court of Appeals of the District of Columbia in the more recent case of the Savings and Trust Co. *vs.* Heiberger, reported in Wash. Law Rep. of May 8, 1902, p. 310, wherein that court said such—

> "formal proof can not be dispensed with by the admission of the caveator *or the consent of all concerned.*"

The language of the statute is clear, explicit, comprehensive, and peremptory in its negation.

> "*Provided,* That *in no case* shall *any* will or testament be admitted to probate and record save upon formal proof of its proper execution."

And what is meant by this "proper execution?"

The statutory provision as it stood in December, 1896, when Ezra W. Leach died, and in March, 1900, when this alleged will was admitted to probate, was in the following words of the Maryland act of 1798, ch. 101, sec. 4, to wit:

> "All devises and bequests of any lands or tenements, devisable by law, shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the said devisor by three or four *credible* witnesses, or else *they shall be utterly void* and of none effect."

And almost in totidem verbis this wise provision of testamentary law was stamped with approval and perpetuated by Congress in section 1626 of the District Code.

The courts have jealously guarded and enforced this provision as a necessary protection of heirs at law, saving their natural rights against the insidious acts of legacy hunters in the last hours of decaying nature. It secures absolutely to them the opportunity to be confronted with the witnesses, not only by rigid cross examination to make clear the fact, *vel non,* that their ancestor was at the time of sound and disposing mind and uninfluenced, etc., the points covered

by the verdict in this case, but also that the paper was signed by him or was signed by another in his presence by his express direction, and that it was attested in the presence of said devisor by the requisite number of witnesses, and not least of these essential things, that such witnesses were *credible.*

And will any one say that even this last is a merely perfunctory, indifferent thing? Shall those be regarded as credible witnesses who have both recently served out their term in prison, convicted and condemned for perjury, or even for horse stealing—or notorious for procuring wills to be made fraudulently—or who may be found to be the secret beneficiaries of the will procured?

No! We submit that this is a valuable right, the provision of the law a vital one, and wisely made jurisdictional, which secures to a man's heirs the opportunity, if the law be duly administered, to ascertain and advise the court whether the witnesses are credible, ought to be believed.

Had the issue of proper legal execution of this will been framed and so laid before the jury they would have been entitled to pass upon the credibility of the subscribing witnesses, even from their appearance and conduct on the stand, and said to the blear-eyed, Bardalphion nose, we do not believe. But the jury had not this opportunity given them. The court had the right and the duty but did not exercise them, and so the heirs have not had in this regard their day in court, without which the admission to probate is non-jurisdictional and *void.*

Second. The facts of the secret trusts to avoid and thwart the policy of our law in respect to devisees for the benefit of religious bodies and ministers is not only evidenced by the record without question, but by the papers laid before the court on our motion for new parties to be added, is shown to be in process of being carried out, and some of the property already been deeded to a religious society.

As to this feature of the case in foro, are not the legal

heirs of a man entitled to as much consideration as the creditors of a man who by will and deed gives his property to another, thereby hindering or delaying them in the enjoyment of their remedies and their interests in such property?

The courts have clearly and repeatedly said that creditors had the right to have such conveyances declared void even before the statute of Elizabeth.

Since that statute they have said that though such conveyance shall have been made in all innocency of heart, bona fide for a purpose proper and good in itself, yet it shall be conclusively held fraudulent and void for reasons of the general policy of the law.

And when, as in the case at bar, the paper propounded as a will is admitted to have been designed to carry out a secret trust in violation of a settled maxim of our civil and political policy, shall it be passed over and allowed against those declared by the law of all ages and all civilized nations the equitable and legal owners of their ancestors' property?

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